



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

FEB 25 2009

Uniform Issue List: 408.03-00

SE:T:EP:RA:T3

Legend:

IRA X	=	***
Amount A	=	***
Amount B	=	***
Amount C	=	***
Amount D	=	***
Period 1	=	***
Date 1	=	***
Date 2	=	***
Date 3	=	***
Date 4	=	***
Company A	=	***

Dear ***,

This is in response to a request submitted on your behalf by your authorized representative dated June 30, 2008, as supplemented by correspondence dated December 5, 2008, concerning the status of a contribution to your individual retirement account (IRA).

The following facts and representations have been submitted under penalties of perjury in support of your request:

You are 77 years old. You had an Individual Retirement Arrangement (IRA), IRA X, which was maintained by Company A. You represent that several unauthorized distributions were made from IRA X. These distributions were made during Period 1 and totaled Amount D. A financial representative of Company A executed these unauthorized distributions. Company A discovered the unauthorized distributions on or before Date 4. It was your intent that Amount D be held in an IRA. You represent that

Amount D has not been used for any other purpose. You and Company A have entered into a settlement agreement and you seek a ruling that Amount D may be contributed as a restorative payment to IRA X.

Based on the facts and representations stated above, the following rulings are requested:

1. You request a ruling that Amount D be considered a restorative payment to IRA X and not subject to the rules for contributions or rollovers to IRAs.
2. You request a ruling the Internal Revenue Service allow a reasonable amount of interest accrued during the distributed period related to Amount D be considered part of a restorative payment to IRA X.

With respect to these requested rulings, Code sections 219 and 408 govern the timing and amount of contributions to Individual Retirement Arrangements (see e.g., Code section 219(b)(1), 219(b)(5), 219(f)(3) and 408(d)(4)).

With respect to the requested letter ruling, section 408(a) of the Code provides that, for purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets certain requirements. Among these requirements is the one found in paragraph (1) of section 408(a) which states that, except in the case of a rollover contribution described in subsection (d)(3), in section 402(c), 403(a)(4), 403(b)(8), or 457 (e)(16), no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year in excess of the amount in effect for such taxable year under section 219(b)(1)(A) on behalf of any individual.

Revenue Ruling 2002-45, 2002-2 C.B. 116 ("Rev. Rul. 2002-45"), applies a facts and circumstances test to determine whether a payment to a plan qualified under Code section 401(a) is a restorative payment or a contribution to the plan. Under Rev. Rul. 2002-45, payments made merely to replenish a participant's account in a defined contribution plan after investment losses are to be treated as contributions. On the other hand, payments that are made to restore some or all of the account's losses due to an action (or failure to act) that creates a reasonable risk of liability are restorative payments. In addition, in order to be a restorative payment, the payment does not need to be the result of legal action; it only needs to be made as a result of a reasonable determination that there is a reasonable risk of liability. Rev. Rul. 2002-45 also provides that the amount of a restorative payment cannot exceed the initial amount of the investment.

Applying the reasoning of Rev. Rul. 2002-45 to IRAs, payments to an IRA are restorative payments only if the payments are made in order to restore some or all of the IRA losses resulting from breach of fiduciary duty, fraud or federal or state securities violations (such as payments made pursuant to a court-approved settlement or independent third-party arbitration or mediation award). In contrast, payments made to an IRA to make up for losses due to market fluctuations or poor investment returns are generally treated as contributions and not as restorative payments.

In the instant case, there is ample evidence that an employee of Company A breached a duty when he made several unauthorized withdrawals from IRA X. The first

unauthorized withdrawal was for Amount A on Date 1. The second was for Amount B and Date 2 and the third was for Amount C on Date 3. You have submitted an affidavit of forgery that reflects that you did not sign for these withdrawals, had no knowledge of the withdrawals and that you did not receive any proceeds from these withdrawals.

Accordingly, losses you suffered in IRA X were not due to market fluctuations or any other external factor other than that of the unauthorized withdrawals. Company A, upon discovering the fraudulent activity, acted to remedy the inappropriate activity by entering into good faith negotiations with you in order to reach a settlement agreement.

Therefore, regarding your first ruling request, from the facts presented in this case, Company A's payment of Amount D was the result of an arm's length settlement of a good faith claim of liability, and, as such, if Amount D is contributed to IRA X, said contribution will be considered a restorative payment to IRA X.

With respect to your second ruling request, Rev. Rul. 2002-45 provides that the amount of the restorative payment cannot exceed the amount of the loss that occurred as a result of the breach of fiduciary duty.

Therefore, in response to your second ruling request, a reasonable amount of interest accrued during the distributed period with respect to Amount D may not be considered a restorative payment.

No opinion is expressed as to the tax treatment of the transactions described herein under the provisions of any other section of either the Code or regulations, which may be applicable thereto. This letter expresses no opinion as to whether IRA X satisfied the requirements of section 408 of the Code.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

Pursuant to a power of attorney on file with this office, a copy of this letter ruling is being sent to your authorized representative. If you wish to inquire about this ruling, please contact ***. Please address all correspondence to SE:T:EP:RA:T3.

Sincerely yours,


Frances V. Sloan, Manager,
Employee Plans Technical Group

Enclosures:

Deleted copy of ruling letter

Notice of Intention to Disclose

cc:
